APPEAL NO. 001037

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on April 10, 2000. With respect to the issues before him, the hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the first, fourth, and fifth quarters. The hearing officer determined that the claimant was not entitled to SIBs in the first and fourth quarters because he returned to work earning more than 80% of his average weekly wage (AWW) during the filing period for the first quarter and the qualifying period for the fourth quarter. He determined that the claimant is not entitled to SIBs for the fifth quarter because he did not satisfy his burden of proving that he had no ability to work and thus, did not satisfy the good faith job search requirement because he did not look for work in the qualifying period for the fifth quarter. In his appeal, the claimant asserts error in each of those determinations, contending that he was underemployed in the filing period for the first quarter and the qualifying period for the fourth quarter and that he had no ability to work in the qualifying period for the fifth quarter. In its response to the claimant's appeal, the respondent (self-insured) urges affirmance.

DECISION

Affirmed.

It is undisputed that the claimant sustained a compensable injury on _____. The parties stipulated that the claimant's impairment rating for his compensable injury is 21%; that he did not commute his impairment income benefits; that the first quarter of SIBs ran from October 1 to December 30, 1998; that the fourth quarter of SIBs ran from July 1 to September 29, 1999; and that the fifth quarter of SIBs ran from September 30 to December 29, 1999. Given the dates of the quarters the claimant's eligibility for SIBs for the first quarter is to be determined in accordance with the "old" SIBs rules, while his entitlement to the fourth and fifth quarters of SIBs is to be determined under the "new" SIBs rules. *See* Texas Workers' Compensation Commission Appeal No. 991555, decided September 7, 1999. The parties did not stipulate as to the dates of the filing period for the first quarter and the qualifying periods for the fourth and fifth quarters; however, those periods were identified, without objection, as being July 2 to September 30, 1998; March 18 to June 16, 1999; and June 17 to September 15, 1999, respectively.

As noted above, the issue with respect to the claimant's entitlement to SIBs for the first and fourth quarters concerns whether he was underemployed; that is, whether he earned less than 80% of his AWW in the filing period for the first quarter and the qualifying period for the fourth quarter. It is undisputed that the claimant's AWW is $285.58 and that 80% of his AWW is $228.46. The claimant's Application for Supplemental Income Benefits (TWCC-52) for the first quarter reflects earnings in the filing period of $3,639.60. Pay records from the self-insured corroborate those earnings; however, they further reflect that $1,442.00 of that amount was paid to the claimant under a sick leave donation policy. That is, the claimant was paid $1,442.00 of the $3,639.60 he received from the employer

because coworkers donated their sick leave for his benefit. The claimant's earnings in the filing period for the first quarter, without including the donated sick leave, were $2,197.60. His average weekly earnings in the 13-week filing period for the first quarter, if the donated sick leave is considered, are $279.97; however, if the sick leave donations are not considered, the claimant's average weekly earnings are $159.05.

The evidence demonstrates that the claimant worked for the bulk of the qualifying period for the fourth quarter, namely the period from March 18 to June 6, 1999. The claimant's total earnings in the qualifying period for the fourth quarter, as reflected on his TWCC-52 and payroll records from the self-insured, were $3,363.33; therefore, his weekly earnings in the 13-week period were $258.72.

The claimant testified that he did not work during the qualifying period for the fifth quarter because he had surgery in June 1999. Mr. G, an accounting manager with the self-insured, testified that the claimant's surgery was performed on June 16, 1999. The operative report from the claimant's surgery was not in evidence. In support of his assertion that he could not work during the qualifying period for the fifth quarter, the claimant offered an August 26, 1999, "Doctor's Work Note" from Dr. P, his treating doctor, which states that the claimant is "not able to participate in job search as it would be detrimental to his recovery. Patient has not worked from 6-4-99 to present."

Initially, we will consider the hearing officer's determination that the claimant is not entitled to SIBs for the first quarter. The resolution of the question of whether the claimant was underemployed in the filing period turns on whether the money the claimant was paid under the self-insured's sick leave donation policy is properly included as wages. The hearing officer included that money in determining the claimant's earnings in the filing period. The claimant contends that the money he was paid under the sick leave donation policy was not properly considered wages within the meaning of that term under the 1989 Act. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.101(8) (Rule 130.101(8)) defines the term "wages" in the context of SIBs as "[a]ll forms of remuneration payable for personal services rendered during the qualifying period as defined in Texas Labor Code § 401.011(43) . . . ." Section 401.011(43) defines "wages," as follows:

> all forms of remuneration payable for a given period to an employee for personal services. The term includes the market value of board, lodging, laundry, fuel, and any other advantage that can be estimated in money that the employee receives from the employer as part of the employee's remuneration.

Given that the term "wages" has the same meaning for purposes of temporary income benefits (TIBs) and SIBs, Rule 129.2, as amended December 26, 1999, which concerns entitlement to TIBs, is instructive on the question before us. Rule 129.2(c)(4) states that post-injury earnings shall include "the value of any full days of accrued sick leave or accrued annual leave that the employee has voluntarily elected to use after the date of injury." In this case, the claimant does not argue that his use of sick leave under

the sick leave donation policy was not voluntary use of accrued sick leave; rather, he contends that receipt of payment for sick leave is not remuneration for personal services. The claimant's eligibility to participate in and benefit from the sick leave donation policy arises because of his status as an employee with the self-insured. Thus, it follows that the money the claimant was paid under the sick leave donation policy was an advantage that he received from the employer as part of his remuneration. And, as such, the $1,442.00, the claimant was paid under that policy during the filing period was properly considered in determining whether he was underemployed at that time. With that amount included, the claimant's weekly earnings in the filing period were $279.97, which is more than 80% of his AWW ($228.46). Thus, the hearing officer correctly determined that the claimant was not underemployed in the filing period for the first quarter and that he is not entitled to SIBs for the first quarter.

After reviewing the record in this instance, we find no merit in the assertion that the hearing officer erred in determining that the claimant was not entitled to SIBs for the fourth quarter. The claimant worked for the self-insured during the portion of the qualifying period for the fourth quarter from March 18 to June 6, 1999, and did not work from June 7 to June 16, 1999. As noted above, his average weekly earnings in that period were $258.72, more than the $228.46 figure which is 80% of the claimant's AWW. Accordingly, the hearing officer appropriately determined that the claimant was not entitled to SIBs during the fourth quarter because he had returned to work and was making more than 80% of his AWW.

The claimant attempted to establish his entitlement to SIBs in the fifth quarter under a no-ability-to-work theory. Under Rule 130.102(d)(3), a claimant can satisfy the good faith requirement if he has no ability to work. Rule 130.102(d)(3) requires that the claimant provide a narrative report from a doctor specifically explaining how the compensable injury causes a total inability to work and that no other records show that the claimant is able to return to work. In this instance, the hearing officer determined that the claimant "did not provide a narrative report from a doctor which specifically explained how the injury causes a total inability to work." That issue presented a question of fact for the hearing officer. The hearing officer was not persuaded that the off-work slip from Dr. P was sufficient to constitute a narrative within the meaning of Rule 130.102(d)(3) and he was acting within his province as the sole judge of the weight and credibility of the evidence under Section 410.165 in so finding. Nothing in our review of the record demonstrates that the hearing officer's determination in that regard is so contrary to the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists to reverse that determination, or the determination that the claimant is not entitled to SIBs for the fifth quarter, on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Judy L. Stephens
Appeals Judge